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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 915

WILLIAM DORN, JR.,
Petitioner,

vs.

BALFOUR, GUTHRIE CO., LIMITED,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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for the Ninth Circuit.

William Dorn, Jr., petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment entered on October 17, 1958, rehearing denied February 3, 1959.

CITATIONS AND OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Ninth Circuit is printed as Appendix "A" to

this petition and is reported, *Dorn v. Balfour, Guthrie & Co., Ltd.*, 262 F. 2d 48.

An opinion of the District Court on a collateral matter not now relevant is reported, *Dorn v. Balfour, Guthrie & Co., Ltd.*, 155 F.S. 203. The opinion of the Court of Appeals appears at 3R. 3.

JURISDICTION.

The judgment of the U.S. Court of Appeals was rendered October 17, 1958. A timely petition for rehearing was filed, which was denied February 3, 1959. (Subsequently, on March 18, 1959, appellant-petitioner filed a motion to recall remittitur, and for leave to file second petition for rehearing, together with second petition for rehearing, based on *Romero v. International Terminal Operating Co.*, (Feb. 24, 1959) 79 Sup.Ct.Rep. 468, 487, which was denied by the Court of Appeals on March 31, 1959.) On April 17, 1959, Mr. Justice Douglas issued an order extending to May 25, 1959, the time within which petitioner might file this petition. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED.

Two questions are presented:

(1) Does a ship's husband owe a duty of care to longshoremen working on the ship while she is in port, either under general law governing the relation

of the ship's husband to the ship in port, or under the course of conduct shown to have existed between the owners and ship's husband on the present record?

(2) In an accident occurring on board a vessel lying on the navigable waters of a United States port, may an agent be liable to a third person for *non-feasance* or only for active *misfeasance*?

STATEMENT OF FACTS.

Defendant-appellee-respondent was at all times mentioned, the port agent for the Peruvian Naval vessels in the Pacific Coast ports of the United States. (Opinion, 3R. 3, App'x "A", p. i, 262 F. 2d 48, 49, Findings, 1R. 49, both referring specifically to the RIMAC; and testimony of Keefer, general employee of appellee's steamship division (2R. 189:6-15) referring to Peruvian Naval vessels generally (2R. 149: 23-24).)

While the ship was on the harbor of San Francisco Bay, being worked by a longshore crew, plaintiff, a longshoreman working aboard her, was injured by slipping on some oil which was on the deck. (Opinion, 3R. 3, App'x "A", p. i, 262 F. 2d 48, 49.) The opinion states that plaintiff's evidence "disclosed that as port agent or 'husbanding agent' the defendant cooperated with the master in giving him advice as to where he could berth his vessel, when in port, giving him assistance in procuring stores and supplies needed for the vessel, and purchasing items required by the master",

(Opinion, 3R. 3-4, App'x "A", p. ii, 262 F. 2d 48, 49.)

In addition, documents from appellee-respondent's own files were called to the attention of the Court of Appeals on petition for rehearing, showing that, in the past, the appellee-respondent had received and handled complaints as to working conditions from the longshoremen on Peruvian Naval vessels (including the RIMAC herself) in Pacific Coast ports of the United States. This correspondence also shows that appellee-respondent received and handled reports of accidents occurring to Peruvian Naval vessels in port, either during loading operations or through collisions with piers.

This part of the record is printed as Appendix "B" to this petition.

The District Court gave judgment in favor of defendant-appellee-respondent upon findings that (2R. 76)—

> "3. . . . Balfour was given no duty or authority either singly or jointly with any other person, firm or corporation, to operate, control or manage the said vessel, no duty or authority to give orders or directions to the master, officers or crew, and it did not at any time have possession or control of the vessel or exercise or have authority or duty to exercise any control over the operation or management of the vessel.
>
> "4. Balfour was not given any duty, authority or responsibility, and did not exercise any authority or control in connection with the cleaning or maintenance of the decks or winches or any

other part of the vessel or her equipment. It did not cause or permit oil to fall or accumulate or remain on the deck of the RIMAC or otherwise cause or permit the ship to become dangerous, unsafe, defective, or unseaworthy."

The Court of Appeals affirmed, upon two grounds:

1) That "no duty respecting the plaintiff ever arose" (Opinion, 3R. 4, App'x "A", p. iii, 262 F. 2d 48, 50); and

2) That, in any event, appellee-respondent as agent "would not be liable to any third person unless or until defendant entered upon the performance of such duties and thereafter was guilty of some negligence". (Opinion, 3R. 4, App'x "A", p. iii, 262 F. 2d 48, 50.)

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred in holding:

1) That a port agent owes no duty to a longshoreman working on a ship in port, either under any general principles governing the relation of the shipowner and port agent, or under the prior course of conduct shown by the present record;

2) The Court of Appeals erred in holding that the liability of an agent to third persons arises only upon active negligence on the part of the agent, and not upon failure to perform acts which the agent may have undertaken and which are designed to protect the safety of third persons.

REASONS FOR GRANTING THE WRIT.

I. THE HOLDING OF THE COURT OF APPEALS IS CONTRARY TO ROMERO v. INTERNATIONAL TERMINAL OPERATING CO., 79 SUP. CT. REP. 867, SO FAR AS IT DEALS WITH THE RESPONSIBILITY OF A PORT AGENT.

Both the trial court and the Court of Appeals held that the port agent was not in control of the vessel, and reasoned that *therefore* the port agent supposedly owed no duty at all to longshoremen working on board. But *Romero v. International Terminal Operating Co.*, 79 Sup.Ct.Rep. 468, 487, held that there might be liability for negligence on the part of a port agent, *independently of employment or control of the vessel.*

Accordingly, it is immaterial that Romero was a crew member, while Dorn is a longshoreman.

The trial court in the *Romero* case pointed out that there was no evidence of the extent of the port agent's undertaking except its general contract (142 F.S. 570, 573):

> "There was no proof adduced at the pre-trial hearing of management, operation and control by Garcia [the port agent] except as it might arise by virtue of the agency agreement."

Nevertheless this Court vacated the judgment as to Garcia, the port agent, with directions to try the issue of negligence apart from the questions of control of the vessel or employment. (79 Sup.Ct.Rep. 468, 487):

> "At the pre-trial hearing the District Court concluded that Garcia and Diaz were not Romero's employer and did not operate and control the vessel at the time of the injury. These issues were properly adjudicated . . . However, the District

> Court did not consider, and its disposition of the case did not require it to consider, whether petitioner was asserting a claim based upon the negligence of Garcia and Diaz, *a claim independent of the employment relationship or operation and control*. Thus it is necessary to remand the case for further proceedings as to this respondent." (Italics added.)

The Court of Appeals cited *Caldarola v. Eckert*, 332 U.S. 155, 158, on this point. (Opinion, R. 4n, App'x "A", p. iiin, 262 F. 2d 48, 50.)

Caldarola v. Eckert dealt exclusively with the question of control (besides it came up from the New York State courts and was decided under New York law). The limitation to the single issue of control is stated as follows (332 U.S. 155, 158):

> "And so the narrow question is whether the Agents were in possession and control of the *Everagra*. This is the crucial issue, because liability in tort by the agent in Caldarola's injury would only arise in New York where there is such possession and control of premises on which injury occurs, due to negligence in their maintenance."

But the *Romero* case explicitly holds that liability of the port agent may be placed on the basis of ordinary negligence and that such negligence may exist independently of employment or control of the vessel. The possibility of negligence necessarily subsumes a duty to the plaintiff. (Cf. e.g., *C. & O. R. Co. v. Mihas*, 280 U.S. 102, 106.)

The holding of the Court of Appeals here, that the port agent owes no duty whatsoever to invitees working on the ship is contrary to the underlying holding of the *Romero* case that liability may be founded upon negligence independent of employment or control of the ship.

Certiorari should be granted to align the present case with the holding as to port agents in *Romero v. International Operating Co.*, 79 Sup.Ct.Rep. 468, 487.

II. THE HOLDING OF THE COURT OF APPEALS THAT AN AGENT MAY BE LIABLE TO THIRD PERSONS ONLY FOR MISFEASANCE AND NOT FOR NONFEASANCE IS CONTRARY TO THE HOLDINGS OF THE FIRST AND EIGHTH CIRCUITS.

The Court of Appeals, holding that an agent is liable to third persons only for active negligence and not for nonfeasance, is contrary to the First Circuit holding in *U.S. v. Hull*, 195 F. 2d 64, 68-9, and to the Eighth Circuit holding in *McDonnell v. Wasenmiller*, 74 F. 2d 320 (as well as to the Ninth Circuit's earlier decision in *Defense Supply Corp. v. Lawrence Warehouse Co.*, 164 F. 2d 773, 775-7).

A. Introduction—Applicable Law.

The injury to plaintiff occurred on board the SS RIMAC, while she was lying on the waters of San Francisco Bay. The action was brought in the United States District Court, and both lower courts have treated it as governed by general federal (maritime)

law, rather than by the law of the State of California as such.

In *Caldarola v. Eckert*, 332 U.S. 155, the accident happened on the waters of the port of New York; the action came up from the state courts of New York. The opinion expressly refrains from deciding (p. 158):

> "... whether New York is the source of the right or merely the means of enforcing it ..."

The opinion says, however (p. 157):

> "There is no question that the injury of which Caldarola complains is a maritime tort."

There was likewise a maritime tort in *Romero v. International Terminal Operating Co.*, 79 Sup.Ct.Rep. 468, and in the case at bar. Both of them have treated the question as one of general federal law, not of the law of the state of the port.

B. Conflict of Circuits as to Agent's Liability.

Treating the question of the agent's liability to third persons as one of federal law, it is a question on which the circuits are in conflict. The court here took the position that an agent is not liable unless he has acted and has acted negligently. This is the old distinction supposedly between "misfeasance" and "nonfeasance". The court below says (3R. 4, App'x "A", p. iii, 262 F. 2d 48, 50):

> "Even if defendant had been employed by its principal, the Republic of Peru, to look after the physical condition of the vessel or its decks, it

would not be liable to any third person unless or until defendant entered upon the performance of such duties and thereafter was guilty of some negligence. Restatement of Agency, Sec. 352."

The *First Circuit* analyzed and rejected the supposed distinction between "nonfeasance" and "misfeasance" on the part of an agent, in *U.S. v. Hull*, 195 F. 2d 64, 68-9, an opinion to which petitioner has nothing to add. (The opinion notes the element of reliance by third persons on the agent's care—an element amply shown in the present case by the evidence quoted in Appendix "B". The court below apparently considered such evidence immaterial to respondent's liability.)

Earlier, the Eighth Circuit had held an agent liable to a third person for *omission*, in *McDonnell v. Wasenmiller*, 74 F. 2d 320, 325, 326. (In fact, the Ninth Circuit itself so held in its prior decision of *Defense Supply Co. v. Lawrence Warehouse Co.*, 164 F. 2d 773, 775-7. This court later held that the Ninth Circuit had no jurisdiction of that appeal (*Defense Supply Co. v. Lawrence*, 336 U.S. 63), but the Ninth Circuit itself, in a subsequent phase of the case, treated its opinion in 164 F. 2d as a legal authority (*Capital Chevrolet Co. v. Lawrence Warehouse Co.*, 227 F. 2d 169, 172, 174).)

The present holding of the Ninth Circuit creates a conflict with the First and Eighth Circuits.

CONCLUSION.

For the foregoing reasons, it is submitted that the Writ of Certiorari should be granted.

Dated, San Francisco, California,
May 5, 1959.

Respectfully submitted,
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GEORGE OLSHAUSEN,
Attorneys for Petitioner.

(Appendices "A" and "B" Follow.)

Appendix "A"

No. 15,905

United States Court of Appeals
for the Ninth Circuit

Oct. 17, 1958
Rehearing denied Feb. 3, 1959

William Dorn, Jr.,
Appellant,
vs.
Balfour, Guthrie & Co., Limited, a corporation,
Appellee.

Before POPE, HAMLEY and JERTBERG, Circuit Judges.

PER CURIAM.

The appellant, plaintiff below, sought to recover damages from the appellee for personal injuries while working as a longshoreman on board the SS Rimac while the ship was lying in port on San Francisco Bay. The Rimac was a Peruvian Naval vessel owned by the Republic of Peru. The appellee was the port agent of the Rimac. The injuries were alleged to have occurred when plaintiff, a winch operator, slipped and

fell on oil which had collected on the deck where he worked.

The plaintiff's theory was that the defendant, as port agent for the vessel, exercised joint control and joint responsibility with the owner of the vessel and its master and hence may be held liable for damages arising from negligent failure to furnish or maintain a safe place for longshoremen to work.

The evidence offered in support of the asserted claim that the defendant had joint control or management of the vessel disclosed that as port agent or "husbanding agent" the defendant cooperated with the master in giving him advice as to where he could berth his vessel when in port, giving him assistance in procuring stores and supplies needed for the vessel, and purchasing items required by the master. The court below found that defendant was given no duty or authority to operate, control or manage the vessel or to give orders to the master or crew and that it did not at any time have possession or control of the vessel; that it did not exercise any authority or control in connection with the cleaning or maintenance of the decks or winches or any part of the vessel or her equipment.

[1] It is plain from all of the evidence that appellee's only function as port agent was to make contractual arrangements for the benefit of the vessel when requested so to do by the master. There is no evidence whatever that it was employed to have anything to do with the maintenance or repair of the vessel

itself, and there is no evidence that it ever assumed to carry out any such function.

[2; 3] The burden was on the plaintiff to show facts giving rise to some duty on the part of the defendant which was owed in respect to persons in the position of plaintiff. Since that burden was not sustained the trial court was correct in its conclusion that defendant "did not at any time have any authority or duty to exercise any control over the operation or management of" the vessel.[1]

[4] Even if defendant had been employed by its principal, the Republic of Peru, to look after the physical condition of the vessel or its decks, it would not be liable to any third person unless or until defendant entered upon the performance of such duties and thereafter was guilty of some negligence. Restatement of Agency, § 352.

Upon this record it must be held that no duty respecting the plaintiff ever arose and the trial court correctly dismissed the action upon the merits.

Affirmed.

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[1]Cf. Caldarola v. Eckert, 332 U.S. 155, 158, 67 S.Ct. 1569, 91 L.Ed. 1968.

Appendix "B"

References are to Plaintiff's Exhibit 3—a sheaf of letters and telegrams, which have distinguishing letters and numbers in pencil in the lower left-hand corners:

(Memorandum—September 14, 1954. (blue paper) (Marked "G-123) (Puget Sound).) "The operation at the waterside Terminal gave us considerable trouble due to the fact that the vessel's gear is old fashioned and in not too good condition. *We also experienced trouble with the standing gear and at one time during the discharging operations we were threatened with a complete shut-down in view of the fact that the longshoremen were very apprehensive with the type of equipment that they had to work with. However, we discussed the matter at some length with the Port Safety Officials and work continued through without further incident.* The general layout of the vessel's lower holds were not at all condusive (sic) to good dispatch due to numerous stantions (sic) also the double shaft recess in the afterhold. The vessels winches had considerable trouble lifting full clam shells at times and believe the attached records will reflect that the average is not as good as has been experienced on previous vessels of more modern design. As an example, the manual braking devices on the winches had difficulty holding the load and in many instances the operator could not check the speed sufficiently to circumvent the clam shell striking the loads in the rail car. This resulted in severe packing of the minerals in the cars and we were informed by the Union Pacific Railway that the cars were go-

ing out in an overloaded condition in spite of the fact the minerals were kept to the chalk line in the gondola."

Blue sheet dated September 9, 1954 (marked G-117): "With regard to the operation of the friction type winch at #1 hatch, would advise that there are several old steam schooner men in the Tacoma gangs, with the result that we had practically no trouble in dealing with this unit."

August 25, 1954 (marked G-76); "Since *the winch at #1 Hatch was exceedingly difficult to operate, being an old friction-type winch, our stevedores suggested utilizing their locomotive crane,* which should increase production from one to two tons per hour. While working in the tween deck lockers discharge was very slow due to the small chamber doors which would not permit the buckets to be rolled into the chambers. This made it necessary for the longshoremen to carry the fish to the buckets and as the chambers were emptied, production lagged considerably. It was also necessary to pay the gang penalty at $.50/.75 per hour from 10 AM to 6 PM on the 20th as the last of the fish in the stbd. chamber began to thaw out and the fish became soft. *Working in the chamber was extremely difficult* and the PMA representative recommended payment of the penalty rate. All the fish from the lower hold were found to be frozen solid, and production was much better in the hold than in the tween decks."

August 19, 1954—B/G Memo—Seely.—B.A.P. RIMAC L.A. St. (marked G-55): "This vessel has only one set of gear at No. 1 hatch, which is a small one, and the derricks are short and have to be rigged low and with a high gunwale, *it*

makes this hatch difficult to work particularly as there are friction winches which are not in very good condition, *and are somewhat dangerous to handle. The other alternative was to use the winches at No. 2,* but to do this it would require two additional hatch tenders, as the winch drivers would have to face aft. *It was felt that the most satisfactory arrangement would be to use a shore crane* which would enable the bucket to be handled faster and could be dumped directly into the chute whereas when derricks are used they have to be landed on the dock first. It was felt that with the use of a crane it would be possible to step up production to about 6 tons per hour or better, instead of 4½ tons. *On going into this with the master, he agreed that this would be the best arrangement to adopt* and in view of your agreement by telephone, we have as from this morning commenced using the crane. The work has been further slowed down by the fact that the doors into the chambers are too small to allow the bucket in, therefore the fish had to be put on chutes or rollers in order to get in under the hatch. . . ." (Italics added.)

(Marked H-51—lower left) longhand sheet (clipped just below letter 11/4/54—Grace-Balfour) dated June 28, 1954—September 26, 1954: "Winch at #1 Hatch old friction type very difficult to operate. Requires one winch driver only. All other hatches require two winch drivers. Can work only one gang each hatch. No. 1 has short jib boom."

Walnut Creek, September 1, 1954—B. O. Hatford, Pilot—to B/G (marked G-107): "I arrived off Pier 26 coming from Selby at approximately

0845, August 30, having the Red Stack Tug Sea Duke made fast on the starboard bow.

". . .

"When I left the ship, I was informed that a scupper guard on the ship's side had cut into the piles on the outer corner of the pier, two or three inches."

Letter August 30, 1954—(marked G-91) B/G-Grace & Co.:

B.A.P. "RIMAC"

"Please be advised that during discharge of lead concentrates from No. 1 tween decks on Sunday, August 28th about 10:30 a.m. one tray hit the ship's rail and fell onto the deck with some possible loss.

"In the event of any claim being filed against the vessel as a result of this incident we shall look to you for reimbursement of any claim the vessel is called upon to pay.

"c.c. Master B.A.P. 'RIMAC'"

Pink sheet August 30, 1954—(marked G-97) Grace & Co.—Am. Smelting & Ref. Co.: "Peruvian Navy Transport SS 'RIMAC' voyage. Your notice of loss or damage claim No. 457.

"We refer to your letter of August 27th to us presenting your notice of intention to file formal claim for loss or damage as soon as the definite amounts are determined.

"Since Balfour, Guthrie & Co. Ltd. San Francisco, Steamer Department, are the appointed agents for the vessel and we only have the task of collecting the freight revenue, we have delivered your letter to them.

". . ."